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Defamation, Privacy and Aspects of Reputation

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Abstract

Unlike the commonplace statement that defamation law protects reputation, this article suggests that it only protects aspects of reputation. Previously, defamation was often the only avenue of legal protection for reputation worth examining, but now privacy actions also offer an avenue of protection for aspects of reputation in many jurisdictions. In other words, informational privacy law now protects aspects of reputation, as does defamation law. Recognizing this fact leads to the suggestion that exactly what each action—defamation and informational privacy—seeks to protect could be stated more concisely. This exercise, undertaken in this article, draws on classic defamation law analysis by Thomas Gibbons. Restating the law in this way would reform defamation law, clarifying and simplifying how it and privacy law coexist, and could offer a useful path for addressing more technical arguments about the boundaries between the actions or the ways in which they should be reconciled.

Defamation, Privacy and Aspects of Reputation

ANDREW T KENYON*

Unlike the commonplace statement that defamation law protects reputation, this article suggests that it only protects aspects of reputation. Previously, defamation was often the only avenue of legal protection for reputation worth examining, but now privacy actions also offer an avenue of protection for aspects of reputation in many jurisdictions. In other words, informational privacy law now protects aspects of reputation, as does defamation law. Recognizing this fact leads to the suggestion that exactly what each action—defamation and informational privacy—seeks to protect could be stated more concisely. This exercise, undertaken in this article, draws on classic defamation law analysis by Thomas Gibbons. Restating the law in this way would reform defamation law, clarifying and simplifying how it and privacy law coexist, and could offer a useful path for addressing more technical arguments about the boundaries between the actions or the ways in which they should be reconciled.

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IN LAW, IT IS ALMOST INVARIABLY STATED that reputation is protected by defamation. The point “is virtually axiomatic in the cases and the literature.”¹ Libel and slander are “the torts which protect a person’s reputation.”² Here I suggest that such a statement is incorrect or, at least, that it can be misleading. It is not reputation but *aspects* of reputation that are protected by defamation law. That is all defamation law has ever protected. In the past, many common law jurisdictions have offered little other protection to reputation, so it has been practical to state that defamation is the law which seeks to reconcile the protection of reputation and free speech. As the Law Commission of Ontario notes in its 2017 consultation paper on defamation, “[h]istorically, reputation was exclusively protected by the law of defamation and the law did not recognize a right to privacy.”³ However, it is not reputation as some complete interest or right that is protected by defamation law, but only aspects of it. Now reputation can also be protected by privacy law, particularly informational privacy law. Such law protects aspects of reputation even if they do not necessarily coincide with

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1. Lawrence McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007) at 1.
 2. Richard Parkes & Alastair Mullis, eds, *Gatley on Libel and Slander*, 12th ed (London: Sweet & Maxwell, 2013) at 4. In this article I use the collective descriptor “defamation” for the actions that, in a minority of Canadian provinces, still exist as libel and slander. The distinction remains in Ontario, British Columbia, and Saskatchewan legislation. See e.g. *Libel and Slander Act*, RSO 1990, c L 12. In many comparable jurisdictions, any distinction between libel and slander has been abolished. The distinction is not of great significance for my purposes.
 3. Law Commission of Ontario, *Defamation Law in the Internet Age: Consultation Paper* (Toronto: November 2017) at 92 [LCO].

those addressed by defamation law.⁴ This is not to suggest that *all* of privacy law is relevant to defamation; clearly it is not. Privacy in the form of protection against intrusion, for example, would be generally quite separate from reputational interests. Rather, the point is that where material is published, it *may* give rise to privacy claims that relate to aspects of reputation. Without considering here the myriad forms of privacy action that exist in relevant jurisdictions, the forms of privacy with which I am concerned can usefully be labelled informational privacy. Breaching informational privacy, much more than breaching personal or territorial privacy, can “involve some form of disclosure or publication ... that, most closely, resemble the kinds of values and interests engaged in defamation law.”⁵

Recognizing this fact leads to the suggestion that exactly what each action seeks to protect could be stated more concisely. Doing so would reform the law in a manner that appears logical given the development of privacy law. It would clarify and simplify how defamation and informational privacy law coexist, without becoming focused on technical arguments about the boundaries between the actions or the ways in which they can or should be reconciled.⁶ The simplicity of the approach appeals as a way of thinking about the actions and assessing how those technical arguments should be addressed. In Canada, where such questions are relatively open,⁷ the approach should be examined closely and,

4. The point could be taken further, for example considering how data protection regulation can protect aspects of reputation rather than privacy actions based in case law or statute. For instance, see David Erdos, “Data Protection and the Right to Reputation: Filling the ‘Gaps’ After the Defamation Act 2013” (2014) 73 Cambridge LJ 536.

5. LCO, *supra* note 3 at 18.

6. Useful analyses of a more technical style exist in the literature. See *e.g.* Eric Barendt, “An Overlap of Defamation and Privacy?” (2015) 7 J Media L 85; Ursula Cheer, “Diving the Dignity Torts: A Possible Future for Defamation and Privacy” in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 309 [Kenyon, ed, *Comparative Defamation*]; David Rolph, “The Interaction Between Defamation and Privacy” in Kit Barker, Karen Fairweather & Ross Grantham, eds, *Private Law in the 21st Century* (Oxford: Hart, 2017) 463.

7. I describe the questions as “relatively open” in part because of the *Canadian Charter of Rights and Freedoms*. Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. While I leave aside detailed consideration of the *Charter*’s implications, I note two points. First, consideration of the *European Convention of Human Rights* does not suggest notable barriers to this article’s argument; see Part IV. Second, in relation to Canadian defamation law and the *Charter*, *Hill v Scientology* deserves careful reconsideration. See *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 [*Hill v Scientology*]. This case recognized the *Charter*’s relevance to defamation law, but contains much reasoning that now reads as archaic. I make brief comments about it below in Part VI.

I would suggest, favourably in any defamation law reform. With the development of privacy law that offers “some protection to reputation,” the Law Commission asks, “where does this leave the law of defamation?”⁸ My response is to suggest that the basis of each action should be clarified, which would help to simplify the relationship substantially. The ideas build on existing legal commentary, perhaps most directly on work by Thomas Gibbons, who argued over twenty years ago for the basis of liability in defamation law to be reconsidered.⁹ He was writing before English law offered protection for privacy in relation to publications. In the current context, where such protection exists, I would take something like Gibbons’s recommendation for defamation law and add to it a similar point about privacy. That would provide a better basis for defamation and privacy law “in the Internet age.”¹⁰

I. COMPARATIVE AND EMPIRICAL RESEARCH

Also relevant in the context of the Law Commission’s inquiry into defamation law in the internet age is the detailed understanding of defamation law in practice seen in wider research. In my assessment, much of that research leads to a similar position to Gibbons’ on this issue. There is a large field of empirical research into defamation law and practice, which began with US law before many

8. LCO, *supra* note 3 at 92.

9. Thomas Gibbons, “Defamation Reconsidered” (1996) 16 Oxford J Leg Stud 587.

10. LCO, *supra* note 3.

other countries,¹¹ and now extends to Canada.¹² My own work forms a strand within that field, focused on comparative defamation law, litigation, and news production. It has included perhaps two hundred interviews with journalists, lawyers, and judges about litigation practice and news production in the United States, United Kingdom, and Australia.¹³ It has also involved analysis of media content relevant to defamation law in various jurisdictions,¹⁴ as well as more traditional doctrinal research into defamation law, cases, or legislative reform, and some comparative doctrinal research on privacy law.

The empirical research in particular has given me a somewhat skeptical view of defamation law's stated aims and what it appears to achieve in practice. In short, I doubt that defamation law does a passable job in terms of either reputation or speech. There are longstanding concerns about defamation law's complexity, litigation costs, predictability, and effects on public debate,

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11. See Marc A Franklin, "Suing Media for Libel: A Litigation Study" (1981) 6 Am Bar Found Research J 795; Marc A Franklin, "A Declaratory Judgment Alternative to Current Libel Law" (1986) 74 Cal L Rev 809; Randall P Bezanson, "The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get" (1986) 74 Cal L Rev 789; Randall P Bezanson, Gilbert Cranberg & John Soloski, *Libel Law and the Press: Myth and Reality* (New York: Free Press, 1987); Randall P Bezanson, "The Libel Tort Today" (1988) 45 Wash & Lee L Rev 535; Rodney A Smolla & Michael J Gaertner, "The Annenberg Libel Reform Proposal: The Case for Enactment" (1989) 31 Wm & Mary L Rev 25; Michael Newcity, "The Sociology of Defamation in Australia and the United States" (1991) 26 Tex Intl LJ 1; Brendan Edgeworth & Michael Newcity, "Politicians, Defamation Law and the 'Public Figure' Defence" (1992) 10 L in Context 39; John Soloski & Randall P Bezanson, eds, *Reforming Libel Law* (New York: Guilford Press, 1992); Brian C Murchison et al, "Sullivan's Paradox: The Emergence of Judicial Standards of Journalism" (1994) 73 NC L Rev 7; Eric Barendt et al, *Libel and the Media: The Chilling Effect* (Oxford: Clarendon Press, 1997); Ursula Cheer, "Myths and Realities about the Chilling Effect: The New Zealand Media's Experience of Defamation Law" (2005) 13 Torts LJ 259; Roy Baker, *Defamation Law and Social Attitudes: Ordinary Unreasonable People* (Cheltenham: Edward Elgar, 2011).
 12. Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) Can Bar Rev 591.
 13. See e.g. Andrew T Kenyon, *Defamation: Comparative Law and Practice* (Abingdon: UCL Press, 2006) [Kenyon, *Comparative Law*].
 14. See e.g. Chris Dent & Andrew T Kenyon, "Defamation Law's Chilling Effect: A Comparative Content Analysis of Australian and US Newspapers" (2004) 9 Media & Arts L Rev 89; Andrew T Kenyon, "Investigating Chilling Effects: News Media and Public Speech in Malaysia, Singapore and Australia" (2010) 4 Intl J Comm 440.

concerns which have continuing weight.¹⁵ Substantial reform to defamation law is warranted, or at least its close and careful consideration is needed. As has been observed of Canadian law, common law rules on a publication's falsity, the publisher's fault, and resulting harm all deserve re-examination.¹⁶ There are strong arguments that the plaintiff should have to prove, in some form, all three of falsity, fault, and harm. Despite such longstanding concerns, law reform efforts across many decades in commonwealth countries tend to have been evolutionary more than they have been dramatic. This underlines an important aspect of the Law Commission's current work. It has canvassed a wide range of issues, including general and substantial change to the law. Within that context of possible substantial reform, I focus on a relatively simple point; namely, how the protection of reputation connects with defamation and privacy law. This leads to a suggestion for what I would call a reform of clarification. This reform would restate the basis of liability in a defamation action seeking damages and the basis of liability in privacy actions responding to publications. The argument leaves open many other possible reforms, including, for example, the value of a response analogous to a right of reply for online publications that harm aspects of reputation. Such a response could lessen the focus on damages and recognize the value in discursive remedies, both suggestions which have been called for in the wider literature.¹⁷ But I suggest that an online focus alone is insufficient, and that wider reform is warranted.

II. THINKING ABOUT DEFAMATION AND PRIVACY

In the recent edited collection, *Comparative Defamation and Privacy Law*,¹⁸ I began with the statement that defamation and privacy "are now two central issues in media law."¹⁹ But that does not mean the actions should cause great

15. See e.g. United Kingdom, *Report of the Committee of the Law of Defamation*, (HMSO 1948); United Kingdom, *Report of the Committee on Defamation* (HMSO 1975); England and Wales, Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (London: 1991); New South Wales Law Reform Commission, *Defamation, Report 75* (Sydney: NSWLRC 1995). In the US context, see Smolla & Gaertner, *supra* note 11 at 31.

16. See e.g. Daniel W Burnett, "The New Face of Defamation" in Todd L Archibald, *Annual Review of Civil Litigation 2016* (Toronto: Thomson Reuters, 2016) 409.

17. See e.g. Alistair Mullis & Andrew Scott, "Reframing Libel: Taking (All) Rights Seriously and Where It Leads" (2012) 63 N Ir Leg Q 3; "Tilting at Windmills: The Defamation Act 2013" (2014) 77 Mod L Rev 87 at 107-108.

18. Kenyon, ed, *Comparative Defamation*, *supra* note 6.

19. Andrew T Kenyon, "Defamation and Privacy in an Era of 'More Speech.'" *Ibid*, 1 at 1.

challenges for each other or should, for example, be merged.²⁰ Rather, I noted that defamation and privacy law had not often been addressed together in detail in the past. Issues of privacy were absent (or were only briefly considered) in books on journalism and law, for example.²¹ That has gradually changed.²² Similarly, twentieth-century law reform reports on defamation often left privacy aside. One that did not, which I will come back to, is the Australian Law Reform Commission's 1979 report *Unfair Publication: Defamation and Privacy*.²³ Beyond that historical instance, in the last ten years or so (and for slightly longer in leading media law chambers of barristers in London) there has been more thought about the overlaps or connections between defamation and privacy actions.

Increased concerns about rights, changed communications technologies, and greater awareness of comparative law have all influenced moves towards greater privacy protection within media law. In the common law world, this is particularly true for Commonwealth jurisdictions; US privacy law is more longstanding but less significant for media publications.²⁴ Privacy is perhaps still understood more as a private law tort action which is effectively overruled by the public First Amendment's protection of free speech, than as a human rights action, the Fourth Amendment protections against unreasonable search and seizure notwithstanding.²⁵ As well as being relevant to raising concerns about privacy, these changes connected to rights, technology, and comparative law

20. Cf Cheer, *supra* note 6.

21. For example, in the Australian context, there was no direct consideration of privacy or confidential information in the classic text of Geoffrey Sawer. *A Guide to Australian Law for Journalists, Authors, Printers and Publishers* (Melbourne: Melbourne University Press, 1949).

22. See e.g. Mark Pearson, *The Journalist's Guide to Media Law* (St Leonards: Allen & Unwin, 1997). For subsequent editions, see Mark Pearson & Mark Polden, *The Journalist's Guide to Media Law*, 4th ed (St Leonards: Allen & Unwin, 2011). A similar pattern can be seen in New Zealand's leading media law text by John F Burrows, with a gradual emergence of privacy as a distinct and detailed topic for examination and a brief mention of lack of clear legal avenues to protect privacy in relation to the media. See *News Media Law in New Zealand* (Wellington: Sweet & Maxwell, 1974) at 337. For a complete chapter on privacy, see the work of John Burrows and Ursula Cheer. *Media Law in New Zealand*, 4th ed (Auckland: Oxford University Press, 1999) at 171-98. See also Ursula Cheer, *Burrows and Cheer Media Law in New Zealand*, 7th ed (Wellington: LexisNexis NZ, 2015).

23. Austl Commonwealth, Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy* (Report 11) (Canberra: Australian Government Publishing Service, 1979).

24. But see Amy Gajda, "The Trouble with Dignity" in Kenyon, ed, *Comparative Defamation*, *supra* note 6 at 246.

25. See e.g. Kirsty Hughes & Neil M Richards, "The Atlantic Divide on Privacy and Free Speech" in Kenyon, ed, *Comparative Defamation*, *supra* note 6, 164 at 164.

have also prompted defamation law reform and increased protection of speech. In many ways, the evolution of both actions has run in parallel.

My point on these changes is simple. While there are ways in which the concepts overlap and some conduct can give rise to actions in both defamation and privacy, this should be much less of a concern than is sometimes suggested. Both actions involve personality interests, but they do not have the same aims. The defence of truth (or the requirement for plaintiffs to prove falsity where that applies²⁶) marks an important limit to what defamation is said to protect. Common law defamation law does not aim to protect a reputation that has been “wrongly” won, such as a reputation based on false facts. That is an aspect of reputation that lies beyond English and almost all commonwealth defamation law.²⁷ It is not that such a publication causes no harm; rather, the harm caused is not wrongful in terms of defamation law.²⁸ If a publication is true, reputation is merely reduced to its “proper level.”²⁹ For present purposes, this is more relevant than the various ways in which reputation has been analysed in the legal literature.³⁰ Defamation should only involve falsehood, as suggested by “its very definition.”³¹ Under current law, defamatory facts that can be proven true—which might well include private facts—do not create liability under defamation law.³² Nor should they do so. Similarly, defamatory privileged facts that have not been

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26. Kenyon discusses this phenomenon in particular regarding both public and private plaintiffs under US law. Kenyon, *Comparative Law*, *supra* note 13 at 241-46.
 27. Descheemaeker has undertaken a close, historically focused examination of the truth defence in defamation, analyzing arguments that defamation law should or should not require public benefit to be shown as well as truth. He prefers the “truth alone” position, which I adopt here. See Eric Descheemaeker, “‘Veritas non est defamatio’? Truth as a Defence in the Law of Defamation” (2011) 31 LS 1.
 28. Leto Cariolou observes that “what strikes one as unfair in certain interferences with reputation is when these produce ‘wrongful’ harm as opposed to *any* harm.” See “Circumnavigating the Conflict Between the Right to Reputation and the Right to Freedom of Expression” in Stijn Smet & Eva Brems, eds, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: Oxford University Press, 2017) 171 at 171, 176.
 29. See e.g. *Rofe v Smith's Newspapers* (1924), 25 SR (NSW) 4 at 21-22 (Street ACJ).
 30. See e.g. Robert C Post, “The Social Foundations of Defamation Law: Reputation and the Constitution” (1986) 74 Cal L Rev 691; McNamara, *supra* note 1; David Rolph, *Reputation, Celebrity and Defamation Law* (Aldershot: Ashgate, 2008).
 31. Descheemaeker, *supra* note 27 at 14.
 32. To avoid misunderstanding, it may be worth stating directly that I use the word “defamatory” in the sense of meeting the relevant legal test for *defamatory meaning* (such as lowering someone in the estimation of ordinary people). Elsewhere, “defamatory” is sometimes used as shorthand for a publication that is *actionable* under defamation law (where the plaintiff's case is made out and no defence applies). That usage, however, can be confusing.

proven true are often protected by defamation law, as they should be. But that need not mean that law fails to protect interests in privacy, just that defamation law does not do so. Such interests can be addressed under privacy law (or allied breach of confidence actions).³³

Here, I address four matters related to the idea that defamation protects only aspects of reputation. First, the historical approach in a minority of Australian jurisdictions is examined where the justification defence required public interest or public benefit to be proven as well as truth. Second, the treatment of reputation under Article 8 of the *European Convention on Human Rights* is considered. Third, the focus on reputation and privacy of Canada's Office of the Privacy Commissioner is noted. Fourth, I ask how matters might be taken further through more precisely specifying what defamation and informational privacy should protect.³⁴

III. MORE THAN TRUTH? SOME FORMER AUSTRALIAN LAW

Australia gained largely uniform defamation laws in 2006.³⁵ Previously, each state and territory had its own defamation law. The former laws could be grouped into a largely common law model followed by most jurisdictions, the "Code" jurisdictions of Queensland and Tasmania, which had substantially codified defamation laws dating from the nineteenth century,³⁶ and the law of the most

33. See e.g. Megan Richardson et al, *Breach of Confidence: Social Origins and Modern Developments* (Cheltenham: Edward Elgar, 2012).

34. Civil law approaches to defamation liability could also be considered, but differences in practice under civilian approaches—as just one aspect, think of legal costs that are far lower and more predictable—mean the overall effects on speech appear to be markedly different, and probably lesser than those of traditional commonwealth defamation. An obvious caveat could be the way that criminal sanctions still apply more often under civilian defamation. But the differences in speed, costs, and (I suspect) predictability are striking. Comparisons could be made with the longstanding and strong criticisms of the complexity of commonwealth defamation law, the expense of litigation, the lack of predictability of disputes, and the effects of the law on public debate. See generally *supra* note 15.

35. See e.g. *Defamation Act 2005* (NSW), No 77. The Acts are collectively referred to as "Uniform Defamation Acts" or "Uniform Defamation Laws." Legislation in each of the states commenced on 1 January 2006, in the Australian Capital Territory on 23 February 2006, and in the Northern Territory on 26 April 2006.

36. See e.g. *Defamation Act 1889* (Qld). Western Australia also had a code, but it had limited application to civil defamation. See *West Australian Newspapers v Bridge* (1979), 141 CLR 535. For more detail on the codes, see Andrew T Kenyon & Sophie Walker, "The Cost of Losing the Code: Historical Protection of Public Debate in Australian Defamation Law" (2014) 38 Melbourne UL Rev 554.

populous state of New South Wales (“NSW”). NSW had used the Code for more than a decade,³⁷ until it adopted a statutory model under its *Defamation Act 1974*, which had some marked differences from the common law.³⁸

For present purposes, it is worth noting that the former law in NSW, the Australian Capital Territory, and the Code jurisdictions required more than truth in the justification defence. The law required proof of substantial truth and that publication was for the public benefit (or in NSW, that it was published in relation to a matter of public interest or on an occasion of qualified privilege).³⁹ Similar “truth plus public benefit” versions of the defence exist in some other common law jurisdictions internationally, but for present purposes the Australian example is sufficient.⁴⁰ It has long been suggested that this sort of additional element should be required. In the 1840s, a Select Committee of the UK House of Lords proposed a “public benefit” requirement for justification in both criminal and civil libel. The change was made for criminal law, but not for civil defamation in England.⁴¹ NSW adopted the suggestion for civil defamation in 1847;⁴² it appears the change was made to protect the reputation of former convicts.⁴³ (Another version of this concern exists in English law under the *Rehabilitation of Offenders Act 1974*, which disallows justification defences in relation to publishing a “spent” conviction where publication occurs with malice.⁴⁴) The Code jurisdictions also required the publisher to show public benefit. Victoria repealed the requirement in the mid-1800s when it separated from what was then the colony of NSW. Elsewhere in Australia, truth was always the only element of the justification defence.

Although this difference between Australian defamation laws existed for more than 150 years, there was virtually no case law on the public interest or

37. *Defamation Act, 1958* (NSW), No 39.

38. See e.g. Andrew T Kenyon, “Imputation or Publication: The Cause of Action in Defamation Law” (2004) 27 UNSWLJ 100 and “Perfecting *Polly Peck*: Defences of Truth and Opinion in Australian Defamation Law and Practice” (2007) 29 Sydney L Rev 651.

39. See e.g. *Defamation Act, 1889* (Qld), *supra* note 36, s 15; *Defamation Act 1974* (NSW), s 15.

40. For a wider review, also considering civil law traditions, see Descheemaeker, *supra* note 27.

41. *Libel Act, 1843* (UK), 6 & 7 Vict, c 96, s 6. This reform was a liberalization, as previously truth had offered no defence to criminal defamation.

42. *Defamation Act, 1847* (UK), 11 Vict No 13, s 4 (sometimes referred to as the *Injuries to Character Act*).

43. See e.g. Austl, NSW, Law Reform Commission, *Report of the Law Reform Commission on Defamation*, (Report 11) (Sydney: Government Printer, 1971) at 64.

44. *Rehabilitation of Offenders Act 1974* (UK), c 53, s 8. See also Descheemaeker, *supra* note 27 at 7-9.

public benefit element of the defence.⁴⁵ It was not a hurdle that posed difficulties in disputes reaching court. While peripheral in litigation, it perhaps affected pre-publication decisions more. In any event, it was abandoned in Australia's uniform defamation laws. The change can be understood as better separating ideas of defamation and privacy (even if privacy protection related to publication still awaits substantial development in Australia).⁴⁶ Overall, the connections of reputation and privacy suggested by Australian history do not appear significant for possible Canadian reforms.

IV. ARTICLES 8 AND 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

There is more to note about debates over Articles 8 and 10 of the *European Convention on Human Rights* and the idea that reputation comes within Article 8 of the *Convention*. This is something that is raised but not analysed in the Law Commission of Ontario's project to date.⁴⁷ European case law examines how reputation is, in some way, part of the "private and family life" that is protected under Article 8. It might be thought to mean that any claim in defamation raises full Article 8 issues, but that would be an error. Article 8 provides that everyone has "the right to respect for ... private and family life," which a public authority cannot interfere with "except as in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others."

Defamation and privacy are intertwined in Article 8, but in some circumstances only. An initial point is that the scope of Article 8 is wider than what would often be labelled "privacy." The provision can well be described as "open and dynamic" in its coverage.⁴⁸ Private life is "a broad term, not susceptible to exhaustive definition," which protects "much more than a straightforward

45. But see *e.g.* *Chappell v TCN Channel Nine* (1988), 14 NSWLR 153.

46. Megan Richardson, Marcia Neave, and Michael Rivette offer a recent review of this phenomenon in the Australian context. See "Invasion of Privacy and Recovery for Distress" in Jason NE Varuhas & Nicole Moreham, eds, *Remedies for Breach of Privacy* (Oxford: Hart, 2018) 165.

47. See LCO, *supra* note 3; David Mangan, *The Relationship Between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content* (Toronto: Law Commission of Ontario, July 2017).

48. See *e.g.* Dirk Voorhoof, "Freedom of Expression versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism" in Stijn Smet & Eva Brems, eds, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford: Oxford University Press, 2017) 148 at 154.

right to privacy.”⁴⁹ One implication is that privacy law elsewhere need not have the same compass.

Beyond the breadth of Article 8, what do the cases suggest about defamation, privacy, and reputation? For my purposes, useful points about the decisions emerge from work of Tanya Aplin and Jason Bosland.⁵⁰ They examine theoretical rationales for a connection between reputation and privacy and seek to explain the Strasbourg court’s Article 8 case law. They aim for an analysis consistent with the cases, but also consistent with their preferred theoretical rationales to understanding reputation and private life. At a general level, I think their points are helpful here, even if Canada can and should adopt a somewhat simpler version of the ideas that emerge from the *European Convention*.

There are three points to take from the analysis. First, the European Article 8 case law is somewhat inconsistent and confusing (which analyses of reputation and privacy can easily become). Even so, there is an overall trend in the cases, with greater structure emerging in reconciling privacy and freedom of expression, and relative clarity about when harm to reputation in a defamation claim does have relevance under Article 8.⁵¹ Second, “Strasbourg has held that reputation and private life are conceptually distinct interests: it is the external evaluation of a person which makes up their reputation and, therefore, reputation per se is not related to private life.”⁵² That is worth emphasizing: The connection between reputation and private life is not ubiquitous; it only arises in some circumstances. Third, as to those circumstances, Aplin and Bosland argue the best interpretation of the cases is that “reputation *does not form part of* private life but that harm to reputation might *cause* harm to private life.”⁵³ It arises in cases of serious reputational harm of a form that means there is harm to private life. They argue that, more than the seriousness of harm as such, it is the *quality* or type of serious harm that should be decisive. The protection of private life is engaged, for example, when the harm relates to the formation of relationships connected with private life.⁵⁴ Thus, the European case law needs to be treated with some care, and the connections between reputation and privacy arise in only some

49. Cariolou, *supra* note 28 at 174.

50. “The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?” in Kenyon, ed, *Comparative Defamation*, *supra* note 6, 265 at 265.

51. See also Voorhoof, *supra* note 48; Cariolou, *supra* note 28.

52. Aplin & Bosland, *supra* note 50 at 266.

53. *Ibid* at 267 [emphasis in original].

54. *Ibid* at 290.

circumstances, namely where harm to reputation is of a kind and seriousness that leads to harm to private life.

In part, my use of Aplin and Bosland is negative: They clearly demonstrate why reputation should not be thought to engage Article 8 automatically. But further, the types of serious harm that they examine—in particular, harm connected with interests in sociality—are useful to keep in mind in thinking about defamation, privacy, and reputation. Defamation has long been called the sociological tort,⁵⁵ but this approach suggests it is not the only one. The point is that reputation is inherently social and that legal actions which seek to protect aspects of reputation will have that sociological quality.

Below, I suggest how the division of defamation and privacy can be taken further, or at least stated more clearly, than the European cases have done to date. This sort of clarification is important when defamation and privacy are more and more frequently raised together. The tendency has been well-recognized in the European context with, for example, Dirk Voorhoof suggesting multiple reasons why more conflicts are now understood to arise between Articles 8 and 10 of the *European Convention*.⁵⁶ Reasons include an expanded sphere for public discourse via both traditional and social media; public and private spheres converging in some ways; individuals sharing more of their private lives online; digital tracking and surveillance, as well as wider data practices, making personal information more accessible to others; and the European Court's expanded interpretations of both Articles.

Indeed, misuse of private information may well become a primary way in which ordinary people think about harm to reputation. In a small-scale study, Jane Bailey and Valarie Steeves suggest that young Canadians view legal protections of privacy as a critical aspect of reputational protection.⁵⁷ They note that “[p]articipants interwove privacy concerns throughout [the] interviews about online reputation and reputational harm,”⁵⁸ and conclude that “legal privacy protections are intimately connected to reputation creation, maintenance and protection.”⁵⁹ They also recognize that defamation law's limits in relation to material that is proven true (and its concern with individual rather than group or collective reputation) make it less suited to addressing these concerns. But

55. See e.g. Jerome H Skolnick, “Foreword: The Sociological Tort of Defamation” (1986) 74 Cal L Rev 677.

56. *Supra* note 48 at 150-56.

57. *Defamation Law in the Age of the Internet: Young People's Perspectives* (Toronto: Law Commission of Ontario, June 2017) at 8.

58. *Ibid* at 7.

59. *Ibid* at 5.

the interesting point is that, at least for informational privacy, the view of these young respondents had parallels with the 2018 comments of a first-instance English judge who stated, “[i]t is ... quite plain that the protection of reputation is part of the function of the law of privacy as well as the function of the law of defamation. That is entirely rational.”⁶⁰

V. OFFICE OF THE PRIVACY COMMISSIONER AND ONLINE REPUTATION

A combination of reputation and privacy concerns can also be seen in Canada’s Office of the Privacy Commissioner (“OPC”) in its 2018 draft policy position on online reputation.⁶¹ Factors noted by Voorhoof—a changed sphere for public discourse, a partial convergence of public and private spheres, individuals sharing personal information, and so forth—mean that thinking about reputation online necessarily means thinking about privacy. At a general level, the OPC favours a public interest test for whether personal information should be available online. It is concerned with issues such as de-indexing and the accuracy, completeness, and currency of information online,⁶² much of which is clearly connected to privacy and the role of public interest within privacy law. It considers possible informal responses (rather than formal legal actions). This is a significant issue in the context of high-volume and low economic value claims about internet content, and relevant to wider defamation reform. Importantly, the OPC notes debates about private sector entities balancing rights to privacy and speech, which might well arise in informal dispute mechanisms. In general, I would agree with criticisms of private sector balancing as a final measure. At the least, some form of accessible public law oversight mechanism would be important. (To say, as the OPC does, that private sector balancing already happens does not make it appropriate without some form of public oversight.) All that lends weight to a simple, quick, cheap public approach to online reputational concerns where possible. Of course, simple, quick, and cheap responses to reputational harm have been sought for decades. Almost every defamation law reform effort

60. *Richard v BBC*, [2018] EWHC 1837 at para 345 (Ch) (Mann J).

61. Office of the Privacy Commissioner of Canada, “Draft OPC Position on Online Reputation” (26 January 2018), online: <www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801> [perma.cc/9XAP-4C88].

62. The OPC considers this specifically in the context of existing Canadian law under the federal privacy law for the private sector. See *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

in the common law world during the twentieth century paid attention to these concerns. The challenge is devising an approach that meets such aims. The need is perhaps even more evident under contemporary conditions of public speech. As Emily Laidlaw has emphasized:

[M]ost online defamation claims are high-volume and low-value. ... [T]here is a high volume of defamation online, but most claims are not worth litigating given low potential damages and legal complexity involved. The end result is that for most wronged there is little opportunity for redress.⁶³

My sense is that stating more concisely just what is sought to be protected by defamation and privacy law could be a useful step in addressing the need for more accessible responses overall.

VI. RESTATING AND REFORMING DEFAMATION: EVALUATION BASED ON FALSE AND DEFAMATORY FACTS

There is another way to explain my general point that defamation and privacy law are largely separate, even though both connect with reputational concerns. That is to return to the Australian Law Reform Commission report from 1979.⁶⁴ *Unfair Publication: Defamation and Privacy* dealt with harmful publication in terms of private facts and defamation, but it did not merge them. They remained two distinct actions, with particular thought given to how they could benefit from similar or complementary procedure and a wider range of remedies.⁶⁵ But within or preceding such reforms, there is a basic question: Just what should defamation aim to protect?

For that purpose, I want to outline something of Gibbons's analysis in the article "Defamation Reconsidered."⁶⁶ He focuses on the basis for liability in defamation law and argues that "the underlying assumption, that reputation

63. *Are We Asking Too Much from Defamation Law? Reputation Systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age: Proposal for Reform* (Toronto: Law Commission of Ontario, September 2017) at 19. See also JC Gibson, "Adapting Defamation Law Reform to Online Publication" (2018) 22 *Media & Arts L Rev* 118. The author, Judge Judith Gibson, heads the defamation list in the District Court of New South Wales.

64. *Supra* note 23.

65. A broadly similar structure is seen in Rowbottom's useful recent analysis "Personal Rights: Reputation and Privacy." See *Media Law* (Oxford: Hart, 2018) ch 2 at 36-109.

66. Gibbons, *supra* note 9.

should be protected, is unfounded.”⁶⁷ Rather, he places reputation within a broader interest in controlling personal information. (One could see links to privacy here, something he might well have explored further if privacy was then protected under English law as it is now.) The issue is understood through the lens of information management: What role should law have in limiting or supporting such management?

For Gibbons, law should not be concerned with reputation as such. A person does not have a right as to how others evaluate him or her—that is, as to the conclusion that they reach—nor should such a right exist. Rather, the legal position should be that people are not *evaluated on the basis of false facts*. In other words, I do not have any right as to what you think of my conduct or statements. You can think what you like. But I do have an interest that your evaluation of me not be based on false facts. As Gibbons states:

It is misleading ... to speak of the law of defamation as vindicating a right to reputation, where that suggests a special claim to particular conclusions about a person's status. Nevertheless, the individual does have a strong interest, if not in the protection of a definitive evaluation of his or her social standing, in attempting to control the elements that produce and modify it.⁶⁸

This might be thought to resemble existing defamation law. It is not at all rare to see statements that defamation law is all about false publications that would make ordinary people think less of the plaintiff. The Law Commission's current inquiry offers examples; another comes from the historic Canadian decision *Hill v Scientology*.⁶⁹ The decision, now more than two decades old, appeared to be somewhat outdated when it was delivered, let alone after substantial developments in the reasoning of the Supreme Court of Canada on defamation.⁷⁰ Even so, much of it remains Canadian law.

67. *Ibid* at 614 [emphasis added].

68. *Ibid* at 593.

69. *Supra* note 7.

70. See e.g. *WIC Radio Ltd v Simpson*, 2008 SCC 40; *Grant v Torstar*, 2009 SCC 61. One of the more interesting analyses of such developments and their implications for Canadian law (but I would differ on how US law is dealt with there) is performed by Bob Tarantino in his article. See Bob Tarantino, “Chasing Reputation: The Argument for Differential Treatment of ‘Public Figures’ in Canadian Defamation Law” (2010) 48 Osgoode Hall LJ 595.

For present purposes, I want to highlight one passage from Justice Cory, who delivered the judgment of almost all the judges.⁷¹ When concluding that US-style reforms to defamation law were not warranted in Canada, Justice Cory stated:

The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting.⁷²

The problem is that the first sentence is wrong or, at least, places far too much weight on the word “aimed.” *Falsity is presumed* and *harm is presumed* in traditional common law defamation. This means actionable statements may well be neither false nor harmful to reputation in any quantified manner. (The highlighted sentence is also surprising in suggesting that defamation law aims at the “prohibition” of publication. Defamation does not prohibit publication, but can make publishers liable after publication.) Perhaps defamation law has been aimed at addressing false publications that harm reputation, but it has pursued that aim in an unusual manner because of its presumptions.

The wording used by Justice Cory is absolutely routine. It is a habitual shorthand, but it is a dangerous one which obscures a key peculiarity of defamation law. If defamation law is aimed at false harmful publications, one might well think it should be reformed. The statement might also be thought ironic, given its position in the judgment’s rejection of US-style reforms. This is because requiring almost all categories of plaintiff to prove falsity is one of the significant changes made by the *Sullivan* rules to US defamation law.⁷³ The *Sullivan* rules highlight the fact that traditional common law does not require proof of falsity.

71. *Hill v Scientology*, *supra* note 7. Justice Cory delivered the judgment of Justices La Forest, Gonthier, Cory, McLachlin, Iacobucci, and Major. Justice L’Heureux-Dubé largely agreed in a separate judgment.

72. *Ibid* at 1187 [emphasis added].

73. *New York Times v Sullivan*, 376 US 254 (1964) [*Sullivan*]. I use the term “*Sullivan* rules” following Michael Chesterman. See *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot: Ashgate, 2000) at 155. The intention is to highlight that the US approach is not a *defence* but a set of increased burdens placed on public figure (and some other) plaintiffs, developed through the case of *Sullivan* and subsequent decisions. For an analysis of the rules and US defamation litigation, see Kenyon, *Comparative Law*, *supra* note 13 at 239-80. The rules have also been applied to media privacy cases. See e.g. Andrew T Kenyon & Megan Richardson, “Reverberations of *Sullivan*? Considering Defamation and Privacy Law Reform” in Kenyon, ed, *Comparative Defamation*, *supra* note 6, 331 at 331, 336-39.

In relation to the burden of proof, Gibbons's analysis suggests it should be shifted with plaintiffs required to prove falsity. As noted above, Gibbons examines what within the concept of reputation should be addressed by defamation law and argues it is the evaluation of people on the basis of false facts. Thus, in an action for damages the burden should be on the plaintiff—as it would normally be in a tort action—to show the information is false. This would mean publishing opinion or comment would not in itself create liability: “[T]he emphasis on evidence of truth also suggests that statements of opinion should not be regarded as parts of the foundation for social appraisal.”⁷⁴

Gibbons is not alone in seeking to rethink how defamation law treats comment. In the US context, Justice Powell famously stated in *Gertz v Robert Welch*:

We begin with the common ground. *Under the First Amendment there is no such thing as a false idea.* However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.⁷⁵

This appears to create a complete protection for opinion, but in *Milkovich v Lorain Journal*, the US Supreme Court re-expressed the requirement and held that actionable defamation requires statements of fact capable of being proved false.⁷⁶ In substance the strength of protection suggested by *Gertz* remains.⁷⁷ What can create liability under US law is false factual inferences conveyed by a publication that otherwise conveys opinion. Gibbons's approach would be similar. Notably, in the Canadian context, Raymond Brown has also observed that opinions that do not convey false facts should not be actionable in defamation. In his view, the current defence is “fundamentally flawed.”⁷⁸ While a critical review of a restaurant, for example, might be thought to harm reputation, it could well be argued that factually false material (if any is conveyed by the review) is what should form the basis of an action for damages. There are separate questions as to whether plaintiffs might continue to face lesser burdens when only seeking discursive remedies and not damages (were such speech-based remedies to be developed).⁷⁹

74. Gibbons, *supra* note 9 at 607.

75. 418 US 323, 339-40 (1974) [*Gertz*] [emphasis added].

76. 497 US 1, 19-20 (1990).

77. See further Kenyon, *Comparative Law*, *supra* note 13 at 246-47.

78. Raymond E Brown, *Defamation Law: A Primer*, 2nd ed (Toronto: Carswell, 2013) at 290-91, 493-94; *The Law of Defamation in Canada*, 2nd ed (Toronto: Carswell, 1994) at 957, n 7. There, Brown opines that “any comment, whether fair or not, or whether or not made on matters of public interest, that does not otherwise imply the existence of undisclosed false and defamatory facts should not be actionable.”

79. See *e.g.* Mullis & Scott, *supra* note 17.

It is probably worth repeating that suggesting plaintiffs should be required to prove falsity in an action for damages is not meant to imply that should be the *only* change to their position. Plaintiffs might also be required to prove some form of fault and harm, as is commonly the case in civil actions.⁸⁰ Nor does the suggestion imply that damages should be the central response of defamation law. There are many valuable analyses calling for a reduction in the focus on damages as a remedy.⁸¹ Second, a question remains as to whether existing common law test(s) for what is defamatory should be reformulated, an issue which is widely addressed in the literature.⁸² Third, the somewhat problematic treatment of meaning within defamation law and practice is left aside here.⁸³

Gibbons considers what type of redress would be appropriate for a law interested in addressing evaluation based on false facts, suggesting that the general shape of the remedy would be “a form of declaratory relief based on the finding that an unsubstantiated allegation has been made.”⁸⁴ This largely non-judicial dispute handling process would be quite different from existing US law, although comparisons could be made with some older reform suggestions there.⁸⁵ For my purposes, the more significant point is that defamation should not seek to protect reputation as such. Rather, it should address evaluation based on false facts. In line with Gibbons’s analysis, I would suggest there is an interest in protecting that aspect of reputation.

VII. REPUTATION AND INFORMATIONAL PRIVACY: EVALUATION BASED ON PRIVATE FACTS

With the development of privacy law related to publication, the analysis could be taken further. I am thinking primarily of developments in English law, but

80. See Archibald, *supra* note 16.

81. See John G Fleming’s “Retraction and Reply” for a classic example. “Retraction and Reply: Alternative Remedies for Defamation” (1978) 12 UBC L Rev 15.

82. See *e.g.* Eric Barendt, “What Is the Point of Libel Law?” (1999) 52 Current Leg Probs 110; McNamara, *supra* note 1.

83. See *e.g.* Kenyon, *Comparative Law*, *supra* note 13; Andrew Scott, “*Ceci n’est pas une pipe*: The Autopoietic Inanity of the Single Meaning Rule” in Kenyon, ed, *Comparative Defamation*, *supra* note 6, 40 at 40.

84. Gibbons, *supra* note 9 at 613.

85. See *e.g.* The Iowa Libel Project and its proposal for a voluntary Libel Dispute Resolution Program, which would determine issues of truth or falsity and reputational harm. Roselle L Wissler et al, “Resolving Libel Out of Court: The Libel Dispute Resolution Program” in Soloski & Bezanson, *supra* note 11 at 286.

some Canadian law raises similar points.⁸⁶ The details on the different approaches and, for example, variation between provinces are not important for my purposes here. At the least, one would understand that privacy is not *always* implicated when questions of defamation arise and that something like the form of serious harm to private life need under the *European Convention of Human Rights* for defamation claims to engage Article 8 should be required.

But one could go further. Defamation should be understood to concern an interest in not being evaluated based on false facts, while privacy should be understood as an interest in not being evaluated based on private facts. To express the point so succinctly might be misleading. Defamation should be concerned with false facts that meet a suitable test of what is defamatory and are not protected by other defences such as qualified or absolute privilege. Privacy should concern private facts that were not published in the public interest (or where another defence applies). Each action should be concerned with false or private information, the publication of which is “wrongful.” But the core idea of evaluation based on false facts or private facts suggests clearly how defamation and privacy actions can coexist, with each relating to aspects of reputation.

VIII. CONCLUSION

I began this article with the point that libel and slander are commonly said to be “the torts which protect a person’s reputation,” quoting a standard commonwealth reference *Gatley on Libel and Slander*.⁸⁷ In fact, there has been a subtle change in this text. Older versions began with their very first paragraph making exactly that point: The subject matter of the book is defamation law which protects reputation.⁸⁸ The twelfth edition has a different initial paragraph, focused on “reputation and defamation.” It is the second paragraph that has the same simple statement about defamation law protecting reputation, but with slightly different wording: “The laws of *libel and slander provide the primary legal means for defending reputation*, and responding to unwarranted and damaging allegations.”⁸⁹

The use of “primary” in that extract is notable. As privacy law has developed, it has become clearer that defamation is not the only legal action that could be thought to protect reputation. Both defamation and privacy, among other possible

86. See *e.g.* LCO, *supra* note 3 at 92-95.

87. Parkes & Mullis, *supra* note 2 at 4.

88. See *e.g.* Patrick Milmo & WVH Rogers, eds, *Gatley on Libel and Slander*, 10th ed (London: Sweet & Maxwell, 2004) at 3; 11th ed (London: Sweet & Maxwell, 2008) at 3.

89. Parkes & Mullis, *supra* note 2 at 3 [emphasis added].

actions, can now claim to protect aspects of reputation. In terms of actions for damages, they should be understood to do so in two distinct ways. With the additional requirements (such as the test for defamatory meaning in defamation claims, or the absence of public interest in relation to privacy claims) and other caveats noted above, the position should be that defamation addresses evaluation based on false facts, and privacy claims related to publication address evaluation based on private facts. Whether larger or smaller reforms are made to defamation law as a whole, clarifying the relationship of defamation law with “reputation” and “privacy” would be a valuable result for any Canadian developments.